IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2198 OF 2006

Godrej Agrovet Limited ]
Pirohshanagar, Eastern ]
Express Highway, ]
Vikhroli, Mumbai 400 079 ].. Petitioner.

V/s.

1. Assistant Commissioner ]
of Income-tax, Range 10(2), ]
having office at 432, ]
Aayakar Bhavam, New Marine ]
Lines, Mumbai - 400 020. ]
]
2. Commissioner of Income Tax, ]
City X, having office at ]
Aayakar Bhavan, New Marine ]
Lines, Mumbai - 400 020. ]
]
3. Union of India, through ]
the Secretary, Ministry of ]
Finance, Government of ]
India, North Block, ]
New Delhi - 110 001. ].. Respondents.

Mr.P.J. Pardiwala, Mr.Jitendra Jain and Mr.Atul K. Jasani for the petitioner.

Mr.Vimal Gupta for the respondents.

CORAM : DR.S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

DATED : 8TH JANUARY, 2007.

**ORAL JUDGMENT : (Per J.P. Devadhar, J.)**

1. Heard. Rule. Rule made returnable forthwith. By consent of the parties, the writ

petition is taken up for final hearing.

2. This petition is filed to challenge the notice dated 9th March, 2006 issued under Section 148 of the Income Tax Act, 1961 ('Act' for short). By the said notice assessment for assessment year 2001-02 is sought to be reopened. The petitioner has also challenged the order dated 21st July, 2006 whereby the objections raised by the petitioner for reopening of the assessment have also been rejected.

3. The petitioner ('assessee' for short) is a multi-unit and multi- product company engaged in the business of manufacturing, trading and exports of animal feeds and marketing of pesticides, plant growth regulator etc. The assessee has more than 10 units located at different parts of the country manufacturing various products.

4. For the assessment year 2001-02, return of income was filed by the assessee on 30th November, 2001 declaring gross total income of Rs.2,73,15,648/-. In the return of income, the assessee had claimed deduction under Section 80IB in respect of two units, one situated at Vijaywada and another known as Sachin Plant-II.

5. The eligible profit of Vijaywada Plant computed by the assessee was Rs.3,86,52,957/- and deduction under Section 80IB (30% of 3,86,52,957/-) claimed was at Rs.1,15,95,887/-. Similarly, the eligible profit of Sachin Plant-II computed by the assessee was Rs.1,18,29,143/- and deduction claimed under Section 80IB (30% of 1,18,29,143/-) was at Rs.35,48,743/-.

6. In the return of income for AY 2001-02, the assessee had also claimed deduction under Section 80HHC in respect of manufacturing exports made from goods manufactured at Plant I of Sachin Unit and the Panvel Unit and trading goods on which no deduction under Section 80IB has been claimed. The assessee computed trading export profit eligible for deduction at Rs.17.17 lakhs and manufacturing export profit eligible for deduction at Rs.0.62 lakhs and claimed 80% of Rs.17.79 lakhs (Rs.17.17 lakhs + Rs.0.62 lakhs) amounting to Rs.14.23 lakhs as deductions under Section 80HHC. The assessee had also claimed depreciation was also claimed on the buildings used for business.

7. After scrutiny, an assessment order for AY 2001-02 was passed on 13th February, 2004 under Section 143(3) of the Act by allowing the deductions

claimed by the assessee with certain modifications. In respect of Vijaywada Plant, the deduction under Section 80IB was allowed as claimed by the assessee. However, in respect of Sachin Plant-II, the Assessing Officer computed the eligible profit at Rs.96,11,224/- and quantified 80IB deduction at Rs.28,83,367/- instead of Rs.35,48,743/- as claimed by the assessee. Similarly, deduction under Section 80HHC was computed at Rs.14,09,702/-. Depreciation was allowed at the rate claimed by the assessee.

8. On the basis of a query raised by the internal audit party, notice under Section 154 of the Act was issued to the assessee on 23rd August, 2004 so as to rectify the mistake in the assessment in relation to the grant of depreciation and deduction under section 80HHC. The assessee filed its reply to the said notice on 30th September, 2004 stating therein that there is no mistake in the assessment and that the depreciation allowed and the deduction granted under Section 80HHC were in accordance with law.

9. During the pendency of the above proceedings, the impugned notice dated 9th March, 2006 has been issued under Section 148 of the Act, thereby seeking to reopen the assessment for

assessment year 2001-02. Reasons recorded for reopening the assessment read thus :

> "It is seen from the records that there was wrong computation of deduction u/s.80HHC of the I.T. Act, 1961 due to negative profit.
>
> When read with the decision of the Supreme Court in the case of M/s.IPCA Laboratories, and also when read with Section 80IA(9) of the Act, keeping in view that after considering profits of units for which deduction u/s.80IB has been claimed, the assessee company will be left with negative profit.
>
> The assessee company had claimed deduction u/s.80HHC of Rs.14,23,970/-. Of this Rs.50,124/- pertains to manufacturing exports and Rs.13,73,846/- pertains to trading exports. As per Annexure 1.4 to Return of Income of the Assessee for Asst.Yr.2001-02, the assessee has profits from manufacturing export activity of Rs.255,98,340.80. Similarly, the assessee has profits from trading exports activity of Rs.17,17,307/-. Thus, the assessee has profits from both manufacturing export activity as well as trading export activity. The principle laid down by the Hon'ble Supreme Court in the case of M/s.IPCA Laboratories is that if the assessee has loss from one export activity and profit from another, such profits should be netted against the losses, and 80HHC can only be claimed on the net figure.
>
> Further, assessee has claimed excess depreciation of 10% instead of 5% on building used for poultry business. From Appendix I pertaining to the table for allowance of depreciation, it may be seen that depreciation is allowable at 10% on buildings other than used for residential purposes. Thus, depreciation rate of 5% for buildings used for residential purposes and for building used for business purposes is allowable at 10%.

> In view of the above, I have reason to believe that income chargeable to tax for A.Y. 2001-02 has escaped assessment for failure on the part of the assessee company to disclose fully and truly all the material facts requiring for assessment for A.Y.2001-02."

10. From the aforesaid reasons, it is clear that the power to reopen the assessment has been invoked basically on two grounds, (one) from the records it is seen that the deduction under Section 80HHC has been wrongly computed and (two) excess depreciation has been allowed on building used for poultry business.

11. Mr.Gupta, learned counsel for the revenue has fairly stated that the reopening of the assessment on the ground that excess depreciation has been allowed in assessment year 2001-02 is not being pressed by the revenue. Therefore, the only issue to be considered in this petition is whether the Assessing Officer had reason to believe that income has escaped assessment on account of wrong computation of deduction under Section 80HHC of the Act.

12. Mr.Pardiwala, learned counsel appearing on behalf of the assessee referred to the reasons recorded for reopening the assessment and submitted that according to the Assessing Officer deduction

under Section 80HHC has been erroneously allowed because, firstly, there was negative profit in the assessment year in question and in the light of the decision of the Apex Court in the case of M/s.IPCA Laboratories V/s. D.C.I.T. reported in 266 ITR 521 (S.C.), deduction under Section 80HHC ought not to have been allowed and secondly the Assessing Officer failed to consider the provisions of Section 80IB (13) read with Section 80IA(9) of the Act, as a result whereof, in spite of negative profit, deduction under Section 80HHC has been erroneously allowed.

13. Mr.Pardiwala submitted that the decision of the Apex Court in the case of M/s.IPCA Laboratories (supra) has no application in the present case, because, in the reasons recorded for reopening the assessment, the Assessing Officer has admitted that the assessee has profits from both the manufacturing export activity as well as trading export activity. Once it is admitted that the assessee has profits from the export activities, there being no loss from export activity, the question of deducting any loss from the export activity as held by the Apex Court in the case of M/s.IPCA Laboratories (supra) does not arise. Accordingly, Mr.Pardiwala submitted that reopening

of the assessment relying upon the decision of the Apex Court in the case of M/s.IPCA Laboratories is wholly misconceived.

14. Mr.Pardiwala further submitted that reopening of the assessment based on the construction of Section 80IB (13) read with Section 80IA(9) is also without any merit because, in the present case, it is admitted by the respondents in their affidavit in reply (at page 92 of the petition) that the assessee had not exported goods manufactured in the industrial units eligible for deduction under Section 80IB. Once it is admitted that the goods manufactured in the industrial units eligible for deduction under Section 80IB have not been exported, then Section 80IB(13) read with Section 80IA(9) would have no application in the computation of deduction under Section 80HHC. In other words, where the goods exported were not manufactured in the industrial unit on which 80IB has been claimed, the question of excluding the 80IB deduction while computing 80HHC deduction does not arise at all. Accordingly, Mr.Pardiwala submitted that in absence of any reason for reopening the assessment, the notice issued under Section 148 of the Act is liable to be quashed and set aside.

15. Mr.Gupta, learned counsel appearing on behalf of the revenue on the other hand submitted that while computing the deduction under Section 80HHC in the regular assessment, the Assessing Officer completely lost sight of Section 80IB(13) read with Section 80IA(9) of the Act. If those provisions were taken into consideration then computation of deduction under Section 80HHC would have been altogether different. In the present case, after reducing the eligible profits of the units on which deduction under Section 80IB has been allowed, then the resultant figure would be a negative profit. If there was negative profit, then as per the ratio laid down by the Apex Court in the case of M/s.IPCA Laboratories Limited (supra), the assessee would not be eligible for deduction under Section 80HHC of the Act.

16. Mr.Gupta further submitted that the assessee had negative profit is also borne out of the fact that the eligible profits of units eligible for Section 80IB deduction were Rs.3,86,52,957/- (Vijaywada Plant) and Rs.1,18,29,143/- (Sachin Plant II) totalling to Rs.5,04,82,100/-, whereas, the gross total income as per the computation of income submitted by the assessee was Rs.2,73,15,648/-. Thus, the assessee had obviously made losses in

other units including losses on account of exports to the extent of Rs.2,31,66,452/- (Rs.5,04,82,100/- minus Rs.2,73,15,648/-). Accordingly, Mr.Gupta submitted that in the light of the decision of the Apex Court in the case of M/s.IPCA Laboratories (supra), it is just and proper that the reassessment proceedings be allowed to be proceeded with. He submitted that it will be open to the petitioner to agitate all the issues before the Assessing Officer and if any adverse order is passed, the petitioner has remedy of filing an appeal and, therefore, this Court ought not to entertain this petition.

17. We have carefully considered the rival submissions. In the present case the assessing officer has invoked the jurisdiction to reopen the assessment for AY 2001-02 within four years from the end of the relevant assessment year, because, firstly, there was negative profit and, therefore, in the light of the decision of the Apex Court in the case of M/s.IPCA Laboratories Limited (Supra) no deduction was permissible under Section 80HHC. Secondly, in the regular assessment the assessing officer failed to consider Section 80IB(13) read with Section 80IA(9) of the Act. If that provision was considered, there would be negative profit and in that event deduction under Section 80HHC would

not have been allowed in the regular assessment.

18. The contention of the revenue that in the present case, there is negative profit from the export activity is wholly misconceived, because, in the reasons recorded for reopening the assessment, the Assessing Officer has clearly recorded that the assessee has profits from the manufacturing export activity as well as profits from the trading export activity. In view of the categorical finding recorded by the assessing officer to the effect that there is profit from the export activity, it is not open to the revenue to allege that there is negative profit from the export from the export activity. When there is profit from the export activity, the question of adjusting any losses as enunciated by the Apex Court in the case of M/s.IPCA Laboratories Limited (Supra) does not arise at all.

19. The next contention of the revenue is that the deduction under Section 80IB allowed is Rs.5,04,82,100/- whereas gross total income as per the computation of income is Rs.2,73,15,648/- and, therefore, there being loss to the extent of Rs.2,31,66,452/- deduction under 80HHC could not be granted. There is no merit in this contention because the fact that some of the units of the

assessee were incurring losses has no relevance for computation of deduction under section 80HHC. In the light of the Judgment of the Apex Court in the case of M/s.IPCA Lab. Ltd. (supra) deduction under section 80HHC cannot be allowed, only if there is profit from the export activity. In the present case, admittedly, there are profits from the export activity and, therefore, deduction granted under section 80HHC cannot be faulted. Consequently, the contention of the revenue that income has escaped assessment by erroneously granting deduction under section 80HHC cannot be sustained.

20. The next contention of the revenue is that in the regular assessment, the Assessing Officer has not discussed the provisions of Section 80IB(13) read with Section 80IA(9) of the Act and if those provisions were taken into consideration, there would be negative profit and consequently deduction under section 80HHC could not be granted. This argument is also without any merit because, in the affidavit in reply filed on behalf of the revenue it is admitted that the assessee had not made exports of the goods manufactured in the industrial units eligible for deduction under Section 80IB. If the goods manufactured in the units availing deduction under Section 80IB were not

exported, then obviously the goods manufactured in those units would not be taken into account for computation of deduction under section 80HHC. In that event, the question of applying the principles laid down in Section 80IA(9) while computing the deduction under section 80HHC does not arise at all.

21. Thus, from the reasons recorded and the affidavit in reply filed on behalf of the revenue, it is seen that there are no reasons on the basis of which prima facie it can be said that income has escaped assessment. Although it is alleged that there is failure on the part of the assessee to disclose fully and truly all material facts, in fact the reopening is based on the facts which are already on record. Therefore, it cannot be said that the assessee has failed to disclose fully and truly all material facts.

22. In this view of the matter, we are clearly of the opinion that in the absence of any material on record to suggest that income has escaped assessment, the impugned notice cannot be sustained.

23. Accordingly, the impugned notice dated 9th March, 2006 is quashed and set aside. Rule is

made absolute in terms of prayer clause (a) of the petition. However, there will be no order as to costs.

24. The writ petition stands disposed of.

(DR.S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)